No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES GREER,
Warden, Menard Correctional Center,
Petitioner,

v.

CHARLES "CHUCK" MILLER,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether it is necessary for this Court to reach the merits of the State's claims relating to the proper standard of review, where respondent would be entitled to relief regardless of the standard of review applied.

II.

Whether the harmless error standard of *Chapman* v. *California* applies to violations of *Doyle* v. *Ohio*, where the *Chapman* standard applies to all federal constitutional errors which are not subject to automatic reversal, including violations of the Due Process Clause of the Fourteenth Amendment.

III.

Whether the harmless error standard of *Chapman* v. *California* should be abandoned on federal habeas corpus review, where the *Chapman* standard and the writ of habeas corpus share a central concern for fundamental fairness.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution
Amendment XIV

All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code
Title 28 § 2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Court of Appeals held that the prosecutor violated respondent Miller's constitutional right to a fair trial by commenting upon Miller's silence at the time of his arrest in violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). (A. 7) After further finding that "the [S]tate has not met its burden of proving that the prosecutor's clear violation of *Doyle* was harmless beyond a reasonable doubt" (A 15), the Court of Appeals granted a writ of habeas corpus and ordered that the State retry respondent Miller. (A 16) On appeal to this Court, the State acknowledges that *Doyle* was violated, but contends that a less stringent standard of harmless error review should be applied to the constitutional violation.

The State's statement of the case is generally acceptable, insofar as it goes. However, since the ultimate resolution of the appeal depends on whether the State's acknowledged constitutional violation constituted harmless error, the additional facts relevant to this issue are set forth below.

A. Pretrial

On February 11, 1980, an Information was filed in Illinois Circuit Court alleging that Charles Miller, "acting in conjunction with Clarence 'Butch' Armstrong and Randy Williams," committed the offenses of kidnapping, aggravated kidnapping, armed robbery, and murder. (C. 2-5) The charges arose from the shooting death of Neil Gorsuch which had occurred during the early morning hours of February 9, 1980.

Prior to respondent Miller's trial, the State agreed to dismiss the charges of murder, aggravated kidnapping, and armed robbery against Williams, in return for his testimony. (JA 6-7) After Miller's conviction, Williams

was sentenced on the kidnapping charge to two years probation, while Miller was sentenced to eighty years in prison. (A 14)

B. Trial

The evidence established that at 1:30 a.m. on the morning of February 9, 1980, Randy Williams, Rick Williams, and Butch Armstrong were observed leaving the Regulator, a Jacksonville, Illinois tavern, in the company of Neil Gorsuch. (Vol. VIII, R. 55-57, 70-71, 75, 80; Vol. VI, R. 321-323) Later the same day at approximately 2:00 p.m., the body of Neil Gorsuch was discovered partially submerged in the Mauvaisterre creek under a bridge in rural Morgan County, Illinois. (Vol. V, R. 46-47, 53-54) A twelve gauge shotgun shell was recovered under the bridge in close proximity to the body. (Vol. V, R. 105)

Randy Williams was arrested the following day. (Vol. IV, R. 28-29) Williams subsequently admitted his participation in a series of event culminatng in the murder of Neil Gorsuch. (Vol. R. 523) Williams also implicated Armstrong and respondent Miller in the murder, but exculpated his brother Rick Williams. (C. 557-558; Vol. III, R. 18-23)

The police searched Randy Williams's residence and seized a twelve gauge shotgun from under Williams's bed. (Vol. VIII, R. 6) Acting on information provided by Williams, the police recovered three shotgun shells near the side of the road approximately two miles from the Mauvaisterre bridge. (Vol. VII, R. 11-12, 52) The police subsequently established that the four shotgun shells recovered at or near the Mauvaisterre bridge had been fired from Williams's shotgun. (Vol. VI, R. 59)

The ensuing autopsy established that Gorsuch had suffered numerous contusions and lacerations about his head

and body prior to death. (Vol. V, R. 161-162) "A gaping laceration" on the forehad of the deceased appeared to have resulted from something "not very sharp, as a knife, but sharp as the corner of an object." (Vol. V, R. 164) It also appeared that two shotgun wounds to the back of the head were present, although it was impossible to determine the exact number of shotgun wounds because of the destruction of the skull. (Vol. V, R. 153-156) Dr. John Dietrich, who conducted the autopsy, described the wounds as "contact" or "near contact" wounds, explaining:

> A contact wound is one in which the weapon is held on the surface of the subject and discharged. A near contact is within a centimeter or so from it — very close, but no[t] quite in contact.
>
> (Vol. V, R. 150, 157)

Dr. Dietrich opined that the cause of death was a gunshot wound to the head, but acknowledged that the death could have occurred from a sharp blow to the head with a hard object. (Vol. V, R. 165-166) Because the county coroner had ignored repeated requests to determine the core temperature of the body immediately after the body was recovered, Dr. Dietrich was unable to estimate the time of death. (Vol. V, R. 83, 98, 120-121, 139-140, 152-153)

Dr. James Hicks, a forensic scientist who had performed approximately 2000 autopsies, examined the autopsy protocol and observed photographs of the deceased. (Vol. VII, R. 137-139) Dr. Hicks concluded that the gaping laceration on the forehead of the deceased was inflicted prior to death, and could have been caused by a martial arts device known as "numchucks." (Vol. VII, R. 139-140) Dr. Hicks opined that Gorsuch could have died prior to receiving shotgun wounds. (Vol. VII, R. 143) Because only a minute amount of blood was found on the

Mauvaisterre bridge, Dr. Hicks concluded that Neil Gorsuch was not shot at the bridge. (Vol. VII, R. 141-142)

1. The Accomplice Testimony of Randy Williams

Randy Williams testified that he owned a twelve gauge shotgun, a .32 caliber pistol, and three pairs of numchucks. (Vol. VI, R. 228, 400) Williams acknowledged that he was proficient with the numchucks, and that they could be used as weapons. (Vol. VI, R. 401, 403)

On Friday, February 9, 1980, Williams began consuming beer at approximately 1:30 p.m. and continued the entire day. (Vol. VI, R. 287, 293-294) That evening, Williams, accompanied by his brother Rick and Butch Armstrong, went to the Regulator tavern. (Vol. VI, R. 287, 293) At approximately midnight, they each consumed "M.D.A.", which Williams described as an "animal tranquilizer." (Vol. VI, R. 290-291) At approximately 1:30 a.m. the trio left the tavern accompanied by Neil Gorsuch, whom they had met for the first time that evening. (Vol. VI, R. 220-223)

Williams further testified that after leaving the tavern, they got into an automobile owned by Rick's girlfriend. (Vol. VI, R. 223-224, 350) According to Williams, they dropped his brother Rick off at the girlfriend's residence, and then rode around. (Vol. VI, R. 224-225) Williams drove while Armstrong and Gorsuch remained in the back seat. (Vol. VI, R. 224)

Williams stated that Armstrong suddenly began hitting Gorsuch and that the beating continued for "quite a while." (Vol. VI, R. 225) Following the beating, a stocking hat belonging to Williams was pulled over the victim's head and eyes. (Vol. VI, R. 227, 346, 350) They subsequently proceeded to Williams's residence. (Vol. VI, R. 226) Williams could not recall how long they had driven

around prior to arriving at his residence. (Vol. VI, R. 340-341)

After arriving at Williams's residence, Gorsuch was ordered into the bathroom. (Vol. VI, R. 227) Williams acknowledged that his .32 caliber revolver was lying on the kitchen table and that his twelve gauge shotgun was located in a closet with three pairs of numchucks. (Vol. VI, R. 228-229) According to Williams, Armstrong placed the revolver in his pocket and then obtained the shotgun from the closet, as well as shotgun shells from a bedroom dresser. (Vol. VI, R. 229-230) Armstrong then struck Gorsuch over the back of the head with the shotgun. (Vol. VI, R. 223) After loading the shotgun, they returned to the car. (Vol. VI, R. 237, 375) Gorsuch had to be led by the arm because his face was still covered by the stocking cap. (Vol. VI, R. 232, 237, 375) Williams estimated that they had remained at his residence for forty-five minutes. (Vol. VI, R. 341)

Williams drove around with Armstrong and Gorsuch seated in the back of the car. (Vol. VI, R. 241) Armstrong fired a shot from the .32 caliber revolver into the backseat, missing Gorsuch. (Vol. VI, R. 241) Williams further testified that they subsequently arrived at a trailer court where respondent Miller resided. (Vol. VI, R. 242-243) Williams could not recall how long it had taken to get from his house to the trailer court. (Vol. VI, R. 341) Williams acknowledged that he had given a signed statement to the police in which he indicated that Armstrong had shot the revolver into the back seat only after leaving the trailer court. (Vol. VI, R. 398)

Williams further stated that Armstrong got out of the car, entered a trailer, and returned a few minutes later with respondent Miller. (Vol. VI, R. 243-244) They subsequently proceeded to the Mauvaisterre bridge with

Williams driving. (Vol. VI, R. 246-247, 255) After arriving at the bridge, Armstrong pulled Gorsuch out of the car, pushed him against the rail of the bridge, pulled the stocking hat off his head, and stated that "we was going to shoot this man." (Vol. VI, R. 257-259) According to Williams, Armstrong handed Miller the shotgun and respondent shot Gorsuch from a distance of ten to twelve feet. (Vol. VI, R. 259-260, 441) Armstrong reloaded the gun and shot Gorsuch. (Vol. VI, R. 261) Williams further stated that Armstrong was standing "back of him a ways" when the shot was fired. (Vol. VI, R. 445)

According to Williams, Armstrong reloaded the gun and directed him to shoot at the body. (Vol. VI, R. 261, 263) Williams shot at the body twice, missing the first time. (Vol. VI, R. 261-263) Williams testified that he was standing toward the back of the car when he shot Gorsuch. The car was parked off the bridge and Gorsuch was leaning over the rail of the bridge. (Vol. VI, R. 446-449) Williams further testified that Armstrong subsequently walked to the body and pushed it over the rail of the bridge. (Vol. VI, R. 264)

They returned to town. (Vol. VI, R. 268) Williams testified that it was still dark out when they arrived in town, but he could not recall how long it took to return from the bridge. (Vol. VI, R. 341) After returning his shotgun to his residence, Williams drove Armstrong home. (Vol. VI, R. 268-269) According to Williams, he and respondent then proceeded to Dottie's Cafe, which was run by Williams's mother. (Vol. VI, R. 269) Williams could not recall how long it took to get from his residence to the restaurant. (Vol. VI, R. 341) Williams stated that it was starting to get light when they arrived at the cafe and they stayed there "a little while" and ate breakfast. (Vol. VI, R. 269-271) They subsequently returned to Miller's trailer and Miller exited the car. (Vol. VI, R. 269-271)

Williams further testified that that the next evening, he and Miller told Rick Williams that they had killed Gorsuch. (Vol. VI, R. 279-280) However, Williams acknowledged that although he had given a formal statement to the police following his arrest in which he admitted his involvement in the crime and implicated Miller, he did not tell the police about the conversation with Rick Williams and Miller that had allegedly occurred the night before. (Vol. VI, R. 467) Williams had stated to police that the only thing he had informed his brother Rick was that "I think I might be in trouble." (Vol. VI, R. 467) Williams further testified that he had lied when he had given the statement to the police. (Vol. VI, R. 468)

Randy Williams concluded his testimony by stating that he had voluntarily participated in the sequence of events which had led to the death of Neal Gorsuch, but everything that had happened was "all Butch Armstrong's idea." (Vol. VI, R. 416, 521)

2. The Testimony of Rick Williams

Rick Williams acknowledged that he left the Regulator Tavern at approximately 1:30 a.m. on the morning of February 9, 1980, in the company of his brother, Butch Armstrong, and Neal Gorsuch. (Vol. VI, R. 165-167) Rick further stated that the following evening, his brother and Miller told him that they had killed Gorsuch. (Vol. VI, R. 173) On cross-examination, Rick identified a signed statement which he had given to the police on February 10, 1980. (Vol. VI, R. 201-203) His brother Randy was present when Rick gave the statement. (Vol. VI, R. 201) The statement contained the following colloquy between the police and Rick Williams:

> POLICE: Rick, did Randy tell you anything last night about what happened after you were dropped off?
>
> ANSWER: All that he said was that he might be in big trouble. I don't really understand if he was in trouble or somebody else was in trouble—someone else was bein[g] in trouble.
>
> (Vol. VI, R. 203-205)

Rick further testified that he had lied when he had given the foregoing statement. (Vol. VI, R. 205) Rick Williams also acknowledged that he had lied when he told the police that Neil Gorsuch was not with them when he, his brother, and Butch Armstrong left the Regulator Tavern Friday night. (Vol. VI, R. 205-206)

3. The Testimony of Respondent Charles Miller

Charles Miller testified that it was approaching daybreak when Butch Armstrong entered the trailer on the morning of February 9, 1980. (Vol. VII, R. 76-77) Miller had been asleep on the living room floor prior to being awakened by Armstrong. (Vol. VII, R. 76) David and Debbie Elliott, Barb Sitton, and Theresa McDade were also present in the trailer. (Vol. VII, R. 76) Armstrong informed Miller that he could not explain what he wanted in front of the others, and asked Miller to accompany him to the car. (Vol. VII, R. 77)

Miller accompanied Armstrong to the automobile where Randy Williams was waiting. (Vol. VII, R. 78) They drove to Williams's residence. (Vol. VII, R. 79) While in route, Armstrong explained that he and Williams needed advice because they had shot someone. (Vol. VII, R. 79)

After entering Williams's house, Miller observed blood on the floor and asked where it had come from. (Vol. VII, R. 83) Williams responded by exhibiting a pair of numchucks and explained that he had hit a man in the head with them. (Vol. VII, R. 83) Armstrong told Miller

that they subsequently killed the man because they were afraid he would contact the police regarding the beating. (Vol. VII, R. 82)

Miller further stated that he and Williams took Armstrong home and then had breakfast at Dottie's Cafe. (Vol. VII, R. 86) After breakfast, Miller returned to the trailer. (Vol. VII, R. 86) He and Williams were arrested the next night at a gas station on their way home from a party. (Vol. VII, R. 105)

4. The Other Relevant Testimony

The parties stipulated that the sun rose at 6:59 a.m. on February 9, 1980. (Vol. VI, R. 491)

David Elliott was present at Miller's trailer when Armstrong arrived on the morning of February 9. (Vol. VIII, R. 179) Elliott observed through the kitchen window that it was approaching daylight at that time. (Vol. VIII, R. 179-182) Elliott further stated that Miller returned to the trailer at 8:00 a.m. (Vol. VIII, R. 175)

5. The Prosecutor's Closing Argument

During his closing argument to the jury, the prosecutor acknowledged that:

> We made a deal, if you want to call that, with a guy who is willing to tell the truth, the man who told the truth of his involvement on February 10, 1980. Sure, he was wrong in details; sure, he left some things out; sure his statement is confusing; sure, he lied at that time about not being with his brother as they left the Regulator Tavern at first, but he was in custody only a few hours. He was charged with murder. He knew they had him, cold turkey, but he told them a story, as they call it, an account, as I call it, shortly after his arrest, factually corroborated by an independent investigator.

> So, if you call that a deal, put that aside. The question is, deal or no deal, did Randy tell you the truth? It really boils down to, who told you the story here and who told you the truth? You either believe Randy Williams or you believe "Chuck" Miller. That is your choice. It's as simple as that.
>
> (JA 45-46)

C. Post-Trial

Following the trial, the court made the following comments while ruling on defense counsel's motion for fees:

> Nothing complex about the trial; the trial, actually, was a swearing match. You had two witnesses, when you get right down to it.

(Vol. XI, R. 62)

The trial judge further commented:

> In this case, without the "swearing match," there was no way the State was going to convict Mr. Armstrong or this defendant, Miller. You had to have Mr. Williams's testimony, so it boils down to a swearing match; which was the jury going to believe?
>
> Fortunately for the State, they believed their witness. Unfortunately for the defendant, they believed their witnesses. Could have gone just the opposite.
>
> (Vol. XI, R. 63)

SUMMARY OF ARGUMENT

1. The State's case against respondent Miller was entirely dependent upon the inherently suspect accomplice testimony of Randy Williams. There was no direct corroboration for Williams's allegations that respondent had been involved in the crimes, and Williams's testimony was severely discredited. Miller, testifying on his own behalf, disputed Williams's allegations and denied involve-

ment in the crimes. On cross-examination, the prosecutor immediately attacked Miller's credibility by commenting on his post-arrest silence in direct violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Following Miller's conviction, the trial judge noted that the trial was in essence a credibility contest and that the outcome "[c]ould have gone just the very opposite."

Chapman v. *California*, 386 U.S. 18 (1967) held that before federal constitutional errors can be held harmless, the court must be able to conclude that they were harmless beyond a reasonable doubt. The State argues that the *Chapman* standard should not be applied either to *Doyle* violations or on habeas corpus review of state convictions. Instead, the State argues that the victim of the constitutional error should be required to demonstrate that the error probably affected the outcome of the trial. However, because the prosecutor's unconstitutional attack on Miller's credibility had a direct effect on the outcome of the credibility contest between Miller and Williams, Miller would be entitled to a new trial even under the standard proposed by the State. Consequently, it is unnecessary to reach the merits of the State's claims concerning the proper standard of review.

II. In *Chapman*, the Court held that federal constitutional errors cannot be found harmless unless they are harmless beyond a reasonable doubt. This Court has repeatedly held that *Doyle* violations are errors of constitutional magnitude. Consequently, the *Chapman* harmless error standard applies to *Doyle* violations.

III. The *Chapman* harmless error doctrine focuses on the fundamental fairness of the trial rather than on the presence of immaterial error, thereby saving the time, effort and expense of unnecessary retrials where the defendant has not been prejudiced by the error. Since

fundamental fairness is also the principal concern of the writ of habeas corpus, there is no reason to abandon the *Chapman* standard on habeas review.

ARGUMENT

I. SINCE RESPONDENT IS ENTITLED TO RELIEF REGARDLESS OF THE STANDARD OF REVIEW APPLIED, IT IS UNNECESSARY FOR THIS COURT TO REACH THE STATE'S CONTENTION THAT THE HARMLESS ERROR STANDARD OF *CHAPMAN* V. *CALIFORNIA* SHOULD BE ABANDONED.

The State acknowledges that the prosecutor violated respondent Miller's constitutional rights by commenting on his post-arrest silence in direct violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Nevertheless, the State does not attempt to prove that the constitutional error was harmless beyond a reasonable doubt as required by *Chapman* v. *California*, 386 U.S. 18 (1967).[1] Instead, the State contends that this Court should abandon the *Chapman* standard and require the respondent to demonstrate "a reasonable likelihood, sufficient to undermine confidence in the result, that the prosecutor's violation of the rule of *Doyle* affected the outcome of the trial." (Brief of Petitioner at 36) However, because respondent would be entitled to relief even under the outcome determinative standard of review, it is unnecessary to reach the merits of the State's claim concerning the applicability of the *Chapman* doctrine. See *Milton* v. *Wainwright*, 407 U.S. 371,

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[1] While the State acknowledges that "[o]verwhelming evidence of guilt" is the "minimum requirement to prove harmlessness" (Brief of Petitioner at 31), petitioner does not argue that the evidence was overwhelming. In fact, the State concedes that "the balance of the State's case provided no direct corroboration for Williams's testimony that respondent participated in the murder . . ." (Brief of Petitioner at 39).

372 (1972) (applying harmless error analysis and "conclud[ing] that judgment under review must be affirmed without reaching merits of petitioner's claim.")

The trial was in essence a credibility contest between Miller and the prosecution's key witness, Randy Williams. Although Williams had confessed his involvement in the crimes, the State dismissed the murder, armed robbery, and aggravated kidnapping charges against him in exchange for his testimony. As the courts below have observed "nothing except Williams's testimony directly link[ed] Miller with the crimes." (A 4, 12; B 4, 8; D 11; E 6) Miller, testifying on his own behalf, vigorously disputed Williams's allegations and denied involvement in the crimes. Following the trial, the trial judge summarized the evidence as follows:

> We sat for nine days, listening to a lot of testimony but when you got right down to it, it was a swearing match between Mr. Williams and Mr. Miller.
>
> (Vol. X, R. 6)

As the trial judge also indicated, the outcome of the trial could have been different:

> Fortunately for the State, they believed their witness. Unfortunately for the defendant, they believed their witnesses. *Could have gone just the very opposite.*
>
> (JA 49) (emphasis added)

Because the trial was a credibility contest whose outcome could have gone either way, the prosecutor's impermissible attack upon Miller's credibility undermines confidence in the outcome of the trial. This conclusion is compelled by (A) the timing and nature of the *Doyle* violation; (B) the importance of respondent Miller's credibility to the outcome of the trial; and (C) the compelling reasons for disbelieving the accomplice testimony of Randy Williams.

A. The Prosecutor's Immediate And Direct Attack Upon Respondent's Credibility Through The Use Of Post-Arrest Silence Was Intolerably Prejudicial Because It Suggested That Respondent Had Fabricated His Exculpatory Testimony.

The prosecutor commenced his cross-examination of respondent Miller as follows:

> Q. Mr. Miller, how old are you?
>
> A. 23.
>
> Q. Why didn't you tell this story to anybody when you got arrested?
>
> (A 3)

Defense counsel immediately objected and moved for a mistrial. The judge denied the motion and instructed the jury to "ignore that last question for the time being." (JA 32) The judge did not further instruct the jury on the prosecutor's reference to Miller's post-arrest silence.

The prosecutor's reference to respondent's post-arrest silence is a tactic often used by prosecutors to shore up a weak case.[2] This tactic is used after the defendant offers an innocent explanation on direct examination. To impeach this exculpatory account, the prosecutor proves through cross-examination that the defendant never informed the arresting officers of his innocent story, thereby suggesting that his testimony was a fabrication concocted later. This Court has recognized that such

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[2] See Gershman, *Prosecutorial Misconduct*, §9.3 at 9-14 (1986) ("References by the prosecutor to the defendant's failure to explain his conduct to the police after arrest is a common abuse."); *United States* v. *Edwards*, 576 F.2d 1152, 1155 (5th Cir. 1978) (Prosecutor "apparently intend[ed] to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence.")

impermissible impeachment tactics are "intolerably" prejudicial. *United States* v. *Hale*, 422 U.S. 171, 180 (1975). As the Court stated:

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.
>
> *United States* v. *Hale*, 422 U.S. at 180.

This Court has also recognized that impeachment evidence "may make the difference between conviction and acquittal." *United States* v. *Bagley*, 87 L.Ed.2d 481, 490 (1985). As the Court stated in *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), "[t]he jury's estimate of the truthfulness and reliability of a given witness may be determinative of guilt or innocence . . ."

The prejudice was compounded in this case by the timing of the prosecutor's impermissible and unconstitutional inquiry. As the Court of Appeals emphasized below:

> No matter how many days the trial lasted or how many witnesses may have appeared, the jury will pay close attention when a defendant accused of crimes as horrible as these takes the stand. That attention undoubtedly is heightened when the prosecutor rises to attack the defendant's story on cross-examination.
>
> (A 12-13)

Thus, the Court of Appeals concluded:

> The prosecutor's improper inquiry, magnified by coming at a time when the jury's attention was focused on Miller, cast substantial doubt on Miller's credibility.
>
> (A 14)

The prejudice was further aggravated because the trial court instructed the jury to ignore the prosecutor's impermissible aspersion on Miller's credibility only "for the time being." (JA 32) As the Court of Appeals recognized, the trial judge's ambiguous instruction implied that the jury could subsequently consider the prosecutor's improper question:

> [W]e believe that the judge's admonition to ignore the prosecutor's reference to Miller's post-arrest silence "for the time being" was simply too ambiguous in the setting of a clear-cut *Doyle* violation to cure the effect of the prosecutor's improper comment. The record reflects that the judge was apparently unaware that the prosecutor's question was a violation of *Doyle*. At the side bar conference following defense counsel's objection to the prosecutor's comment, the judge stated: "I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question."
>
> Thus, the instruction that the judge gave to the jury reflected what he apparently was thinking at the time, which was that the jury might be able to consider the prosecutor's comment and the implications arising therefrom at some point in the future.
>
> (A15)

Because of the importance of respondent's credibility to the outcome of the trial, it simply cannot be said that the flawed and ambiguous instruction in any way cured the prosecutor's misconduct. As Justice Simon of the Illinois Supreme Court emphasized in his dissent:

> The trial court only directed the jury to ignore the prosecutor's remarks *"for the time being."*

> Given that the trial was essentially a credibility contest between Williams and the defendant, this opaque instruction did not render the prosecutor's remarks harmless error. It did not prevent the prosecutor's highly questionable cross-examination tactic from infecting the defendant's entire testimony and lowering its value to the jury.
>
> (D 13) (emphasis added)

In *Stewart* v. *United States*, 366 U.S. 1 (1961), the defendant, who had declined to testify at his first two trials, took the stand at the third. On cross-examination, after the defendant admitted that he had been "tried on two other occasions," the prosecutor asked: "This is the first time you have gone on the stand, isn't it?" The Court found the question improper and concluded that the error was not harmless. Speaking of a potential cautionary instruction to the jury, such as the one given in this case, the Court said:

> [T]he danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failure to testify.
>
> 366 U.S. at 10.

Therefore, it is clear that the prosecutor's impermissible attack on Miller's credibility—magnified by coming at a time when the jury's attention was focused on Miller, highlighted by defense counsel's forced objection, and aggravated by the ambiguous instruction—was intolerably prejudicial.

B. The Prejudicial Impact Of The Prosecutor's Unconstitutional Attack On Respondent's Credibility Was Intolerable In This Case Because The Outcome Of The Trial Depended On The Jury's Assessment Of Respondent's Credibility.

During his closing argument to the jury, the prosecutor acknowledged that:

> It really boils down to, who told you the story here and who told you the truth? You either believe Randy Williams or you believe Chuck Miller. That is your choice. It is as simple as that.
>
> (Vol. VII, R. 174)

Accordingly, the trial judge found that:

> Nothing complex about the trial; the trial actually, was a swearing match. You had two witnesses, when-you got right down to it. All the rest was dressing . . .
>
> (JA 49)

The Illinois Appellate Court held:

> The trial was essentially a credibility contest between defendant Miller and Randy Williams. The reference to post-arrest silence cast aspersions on Miller's credibility and may have irreparably prejudiced him in the eyes of the jury.
>
> (E 7)

Justice Simon of the Illinois Supreme Court stated:

> The jury had the sole responsibility for resolving the sharp conflict between the testimony of Williams and the testimony of the defendant. The resolution of this conflict depended totally upon the jury's assessment of the defendant's credibility, for the other evidence could have fairly supported either the defendant's or Williams's story.
>
> (D 12) (dissenting opinion)

And the Court of Appeals concluded:

> Because the crucial issue at trial was credibility, the *Doyle* violation went to the heart of the truth-seeking process.
>
> (A 16)

Therefore, because the outcome of the trial depended on the jury's assessment of Miller's credibility, the prejudicial impact of the prosecutor's impermissible inquiry was intolerable.

C. Since The Accomplice Testimony Of Randy Williams Was Impeached, Severely Discredited By Other Evidence, And Lacked Material Corroboration, A Reasonable Likelihood Exists That The Prosecutor's Misconduct Affected The Outcome Of The Credibility Contest Between Respondent And Williams.

Although Randy Williams had confessed to the crimes, the State dismissed murder, armed robbery, and aggravated kidnapping charges against him in return for his testimony. Williams subsequently pled guilty to kidnapping and was sentenced to two years probation. The State's case against respondent Miller was entirely dependent upon Williams's testimony.

Williams testified that he, his brother Rick, and Butch Armstrong met Neil Gorsuch in a tavern. The four men left together at about 1:30 a.m. After taking Rick home, Williams drove around while Armstrong battered Gorsuch in the back seat of the car. They proceeded to Williams's residence after covering Gorsuch's head and face with a stocking hat. After arriving at Williams's residence, Armstrong beat Gorsuch again and armed himself with Williams's .32 caliber revolver and twelve gauge shotgun. The three men got back into the car and drove to the trailer home where Miller was staying. While Williams and Gorsuch waited in the car, Armstrong went in and talked briefly to Miller. Armstrong and Miller then left the trailer and got into the car. Williams drove to a bridge in an isolated rural area, where Armstrong removed Gorsuch from the car and stood him up against the bridge railing. Williams, Armstrong, and Miller then each shot Gorsuch once in the head with the shotgun, and

Armstrong pushed the body over the railing into the creek below.

Respondent Miller, testifying in his own behalf, vigorously disputed Williams's story. Miller stated that Armstrong and Miller came to the trailer for advice *after* they had committed the murder. Miller testified that the pair told him that Williams had beaten Gorsuch with a pair of "numchucks" and that Gorsuch had been shot to prevent him from going to the police.

While there were no compelling reasons to doubt Miller's testimony, the accomplice testimony of Williams was riddled with infirmities. As Justice Simon of the Illinois Supreme Court indicated, such testimony is inherently suspect:

> Accomplice testimony of this kind is inherently unreliable as it often may be motivated by pressures other than the witness' desire to tell the truth, "such as a promise of leniency or immunity and malice toward the accused."
>
> (D 11-12) (dissenting opinion)

The State reasons that Williams had no reason to lie about Miller's involvement in the murder because Williams "could have negotiated an agreement based on his testimony against Armstrong alone." (Brief of Petitioner at 39) However, it must be remembered that Williams had confessed his involvement in the crime to Miller. Thus, Miller was a potential threat to Williams's liberty because of his knowledge of Williams's criminal involvement. Moreover, at the time of Williams's arrest the police had three suspects: Williams, his brother Rick, and Armstrong. By implicating Miller, Williams exculpated his brother Rick.[3]

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[3] The record indicates that after Randy Williams implicated respondent and Armstrong, Rick Williams was eliminated as a suspect. (C. 557)

In addition to being subject to suspicion, Williams's testimony was discredited by other evidence introduced at trial. For instance, Williams testified that Gorsuch was shot from a distance of ten to twelve feet. However, the pathologist who performed the autopsy, testifying on behalf of the prosecution, offered his expert opinion that the shotgun was in contact with Gorsuch's head when the shots were fired.

Expert testimony also indicated that Gorsuch was not shot at the bridge as Williams alleged. Further expert testimony revealed that Gorsuch could have died as a result of a blow to the head by a pair of numchucks. Although Williams was skilled in the use of martial arts weapons known as numchucks and had three pairs of numchucks hanging on the wall of his residence, he denied that he had used them to strike Gorsuch.

Furthermore, all the physical evidence presented at trial linked Williams, but not Miller, to the crimes. For example, the numchucks belonged to Williams; the revolver belonged to Williams; the shotgun used to kill Gorsuch belonged to Williams; the house where the beating occurred belonged to Williams; and the vehicle which was used to transport Gorsuch to the bridge was driven by Williams and belonged to his brother's girlfriend.

Finally, Williams's testimony concerning Miller's involvement in the crimes was not substantially corroborated. As the Court of Appeals held:

> With regard to the crucial part of Williams's testimony—his assertion that Miller took part in the murder of Neil Gorsuch—there was no direct corroborative evidence and Miller denied being present when the murder was committed.
>
> (A 13-14)

While the State notes that "Rick Williams did corroborate his brother's testimony when he testified that respondent admitted participating in the murder" (Brief of Petitioner at 37, n.6), it is also noteworthy that the Williams brothers were both impeached on this point and Miller denied being present when the alleged conversation took place. Rick testified that on the evening following the murder, Randy Williams and Miller told him that they had killed Gorsuch. However, on cross-examination, Rick identified a signed statement which he had given to the police on the day after the alleged conversation. The statement contained the following colloquy:

> POLICE: Rick, did Randy tell you anything last night about what happened after you were dropped off?
>
> ANSWER: All that he said was that he might be in big trouble. I don't really understand if he was in trouble or somebody else was in trouble—someone else was bein[g] in trouble.

Rick testified that he had lied when giving the foregoing statement. Rick also testified that he had also lied when he told the police that Neil Gorsuch was not with them when he, his brother, and Butch Armstrong had left the Regulator Tavern Friday night.

Moreover, Randy Williams had also neglected to mention the alleged conversation with Miller to the police. In fact, Randy Williams specifically advised the police that the only thing he had informed his brother was that "I think I might be in trouble." Randy Williams further testified that he had lied when he had given that statement.

The foregoing review of Williams's testimony casts substantial doubt on his assertion that Miller had been

involved in the crime. Significantly, the prosecutor's comments during closing argument reveal that he was well aware of the infirmities inherent in Williams's testimony:

> Randy Williams got a deal; he got the charges of murder dropped against him.
>
> Sure he was wrong in details; sure, he left some things out; sure, his statement is confusing; sure, he lied at that time about not being with his brother as they left the Regulator Tavern . . .
>
> (JA 45-46)

Cognizant of the weakness of his case, the prosecutor took a calculated risk and impermissibly attacked respondent's credibility in direct violation of *Doyle* v. *Ohio*. Implicit in the prosecutor's assumption of the risk of being overturned on appeal was the recognition that his misconduct could affect the outcome of the trial.

For these reasons, the prosecutor's impermissible attack on respondent Miller's credibility "undermine[s] confidence in the outcome" of the trial. (Brief of Petitioner at 24) Consequently, the judgment of the Court of Appeals granting respondent Miller a new trial should be affirmed without reaching the State's remaining arguments.

II. THE HARMLESS ERROR STANDARD OF *CHAPMAN* v. *CALIFORNIA* APPLIES TO FEDERAL CONSTITUTIONAL ERRORS, INCLUDING VIOLATIONS OF *DOYLE* V. *OHIO*.

In *Chapman* v. *California*, 386 U.S. 18, 24 (1967), the Court held that before a federal constitutional error can be held harmless, the benficiary of the error must prove beyond a reasonable doubt that the error did not contribute to the verdict. As the Court stated:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.
>
> 386 U.S. at 24.

The State has acknowledged that the prosecutor injected constitutional error into Miller's trial by commenting upon respondent's *Miranda* (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) warnings silence in direct violation of this Court's decision in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). However, despite being both the source and the beneficiary of the error, the State argues that the burden should be on respondent to establish outcome determinative prejudice.

The standard of harmless error review proposed by the State requires a defendant to prove that he would probably have been acquitted had the prosecutor not injected constitutional error into the trial. However, this type of proposal has been authoritatively condemned as an impermissible function of harmless error analysis. As the Court stated in *Kotteakas* v. *United States*, 328 U.S. 750, 764 (1946):[4]

> [I]t is not the appellate court's function to determine guilt or innocence.
>
> * * * *
>
> The question was not [whether the jury was] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had upon the jury's decision. The crucial thing is the

[4] In the State's petition for certiorari, the State argued that *Doyle* should be governed by the *Kotteakas* standard of harmless error review. Following the grant of certiorari, the State abandoned this argument.

impact of the thing done wrong on the minds of other men, not one's own, in the total setting.

Recently, in *Delaware* v. *Van Arsdall*, 89 L.Ed.2d 674, 683 (1986), this Court rejected the State's suggestion that the outcome determinative prejudice standard should be applied to violations of the Confrontation Clause.

Nevertheless, the State maintains that this Court's precedents mandate the application of the outcome determinative prejudice standard of review to violations of the Due Process Clause. As an ancillary position, the State intimates that violations of *Doyle* are not sufficiently egregious to justify application of the *Chapman* harmless beyond a reasonable doubt standard of review.

A review of the State's arguments reveals that (A) the outcome determinative prejudice standard is inapplicable to identifiable constitutional errors; (B) *Doyle* violations are constitutional errors of the most basic sort; and (C) significant policy and constitutional considerations militate against the abandonment of the *Chapman* standard.

A. Since The Requirement Of Actual Prejudice Relates Only To The Necessity Of Establishing An Error Of Constitutional Dimension, It Is Unnecessary To Prove Actual Prejudice In Addition To Identifying A Federal Constitutional Error.

The State reasons that when errors are "alleged" under the Due Process Clause "actual prejudice"[5] must be shown "in order to elevate them to the level of a constitutional violation." (Brief of Petitioner at 20) However, as

[5] As used by the State, "actual prejudice" is a generic term encompassing a variety of standards. Petitioner ultimately defines "actual prejudice" as a requirement that the victim of the constitutional violation prove that "but for the error" the outcome probably would have been different. (Brief of Petitioner at 20-24)

the State's reasoning implies, this is the standard for determining whether ordinarily nonconstitutional trial error is so prejudicial as to rise to the level of a constitutional violation. Since the State has conceded that a federal constitutional violation occurred in this case, the *Chapman* standard of review applies. See *Rushen* v. *Spain*, 464 U.S. 14 (1983) (applying *Chapman* standard where the State conceded that the error was of constitutional dimension).

The distinction between the application of the actual prejudice standard and the *Chapman* standard, in the context of improper prosecutorial comment, is exemplified by comparing *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974) and *Darden* v. *Wainwright*, 106 S.Ct. 2426 (1986) with *Griffin* v. *California*, 380 U.S. 609 (1965). In *Donnelly* and *Darden* the comments, while improper, were not *per se* violative of the Constitution. Thus, the defendants were required to show actual prejudice. However, in *Griffin* v. *California*, 380 U.S. 609 (1965), the *Chapman* standard applied because the prosecutor's comments violated the defendant's constitutional right to remain silent under the Fifth Amendment. As the Court of Appeals explained below:

> Once the trial error has been identified as one of constitutional magnitude, then the *Chapman* standard is applied to determine whether the conviction must be reversed.
>
> *Donnelly* itself made clear this scheme, explaining that the habeas petitioner there could point to nothing in his trial that specifically violated the constitution, such as prosecutorial comments on his right to remain silent. Instead, the petitioner complained of the prosecutor's expression of personal opinion as to guilt, an error that would not implicate the petitioner's fourteenth amendment right to due

process unless it actually "infected the trial with unfairness."

Thus, the petitioner has an uphill battle when he seeks to establish general trial error as constitutional error. But where the violation at trial is one of constitutional magnitude, then the government bears the "more onerous" burden of *Chapman*. (Citation)

(A 9) (citations omitted)

The other cases cited by petitioner in support of the actual prejudice standard are distinguishable on the same basis. For instance, in *United States* v. *Bagley*, 105 S.Ct. 3375 (1985), the Court was urged to reverse automatically or apply the *Chapman* standard to the government's failure to disclose impeachment material to the defendant. The Court explained that a threshold inquiry first had to be undertaken to determine whether the nondisclosure amounted to a constitutional violation: "such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." 87 L.Ed.2d at 491. However, compare *Napue* v. *Illinois*, 360 U.S. 264 (1959), where the Court held that the knowing use of perjured testimony violated due process. Since this was a constitutional error *per se*, the defendant was not required to show actual prejudice. Instead, the Court merely inquired as to whether the false testimony "may have had an effect on the outcome of the trial."[6] *Napue* v. *Illinois*, 360 U.S. at 272.

In *Simmons* v. *United States*, 390 U.S. 377 (1968), *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), and *Neil* v.

[6] Although *Napue* antedated *Chapman*, this Court has recognized that there is little, if any, difference between the harmless error rule applied in *Napue* and the *Chapman* "harmless beyond a reasonable doubt" standard. *See Chapman* v. *California*, 386 U.S. 18, 24 (1967); *United States* v. *Bagley*, 87 L.Ed.2d 481, 492 at n. 9 (1985).

Biggers, 409 U.S. 188 (1972), the defendants alleged that they were denied due process because the police employed suggestive identification procedures. Since *Stoval* v. *Denno*, 388 U.S. 293, 302 (1967) held that due process is not violated unless the identification procedure was "unnecessarily suggestive" and "conducive to irreparable misidentification," a threshold inquiry had to be undertaken in these cases to determine if the defendants had established a constitutional violation. However, if the defendant can identify an error of constitutional magnitude such as the deprivation of counsel at a post-indictment lineup, the threshold inquiry is unnecessary and the *Chapman* standard applies. *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977).

Similarly, before a defendant can prevail on a claim that he was convicted pursuant to an erroneous jury instruction, it must be established that the instruction "violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp* v. *Naughten*, 414 U.S. at 146 (1973). Accordingly, unless the defendant can identify a specific due process violation such as a burden shifting presumption (*Rose* v. *Clark*, 92 L.Ed.2d 460 (1986)), actual prejudice must be shown to elevate the error to the level of a constitutional violation. *Cupp* v. *Naughten*, 414 U.S. at 146-147; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

Holbrook v. *Flynn*, 89 L.Ed.2d 525 (1986), in which uniformed guards were present in the courtroom during the defendant's trial, is another example of a set of facts which does not disclose a constitutional violation *per se*. The Court held that because the presence of uniformed guards does not necessarily violate due process, the defendant was required to show actual prejudice in order to establish a constitutional violation. In contrast to *Flynn* is *Rushen* v. *Spain*, 464 U.S. 114 (1983) where the

State conceded that undisclosed *ex parte* communications between the judge and a juror constituted constitutional error. Accordingly, the Court held that the *Chapman* standard was applicable. 464 U.S. at 120.

Finally, the State cites *Strickland* v. *Washington*, 466 U.S. 668 (1984) where the Court held that the defendant must show actual prejudice in order to establish a violation of the Sixth Amendment right to effective assistance of counsel. As in the other cases relied on by the State, this is a threshold inquiry into whether a constitutional violation has been established. Because attorney errors are difficult to define (466 U.S. at 693), the defendant is required to show actual prejudice so as "to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not." 466 U.S. at 703 (Brennan, J. concurring) Because the government is not responsible for errors by defense attorneys (466 U.S. at 693), the burden is shifted to the defendant to show that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

The reasoning underlying the *Strickland* decision is inapplicable to violations of *Doyle* v. *Ohio*. Unlike claims of ineffective assistance of counsel, comments on a defendant's *Miranda* warnings silence are easily identified. Moreover, because the prosecution is directly responsible for such comments, *Doyle* violations are easy for the government to prevent. *See Strickland* v. *Washington*, 466 U.S. at 692.

The foregoing analysis reveals that the *Chapman* standard applies to "federal constitutional error" (*Chapman* v. *California* 386 U.S. at 24), including identifiable violations of the Fourteenth Amendment (*Napue* v. *Illinois*,

360 U.S. at 272; *Rose* v. *Clark*, 92 L.Ed.2d at 471; *Rushen* v. *Spain*, 464 U.S. at 120). Thus, the relevant distinction for harmless error review is not between the various provisions of the Constitution as the State suggests, but between those errors which can be identified as constitutional violations *per se* and those that can not.

B. Prosecutorial Comment Upon An Accused's *Miranda* Warnings Silence Is Fundamentally Unfair And Patently Unconstitutional.

In *Doyle* v. *Ohio*, 462 U.S. 610 (1976), the Court held that a defendant's silence at the time of arrest and after receiving *Miranda*[7] warnings could not be used to impeach his testimony at trial. The Court reasoned that because *Miranda* warnings implicitly assure the arrestee that his silence will not later be used against him, it would be fundamentally unfair and a violation of due process to allow the government to subsequently impeach the defendant with *Miranda* warnings silence.

Arguing that the reasoning underlying *Doyle* was "explicitly retracted" in *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the State concludes that *Neville* and other decisions following *Doyle* have established that "[w]hile a broken promise may be cause for concern, it does not necessarily follow that fundamental fairness has been denied." (Brief of Petitioner at 25, 28) However, a review of the relevant authorities reveals that this Court has continued to reiterate the view that *Doyle* rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then

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[7] *Mirandi* v. *Arizona*, 384 U.S. 436, 478-479 (1966), mandates that before an individual is subjected to custodial interrogation he must be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law. . ."

using his silence to impeach an explanation subsequently offered at trial." *South Dakota* v. *Neville*, 459 U.S. at 565.

For instance, in *Jenkins* v. *Anderson*, 447 U.S. 231, 240 (1980), while holding that impeachment with pre-arrest silence is permissible, the Court emphasized that no government action had induced the defendant to remain silent. In *Anderson* v. *Charles*, 447 U.S. 404, 407-408 (1980), the Court explained that the use of silence for impeachment was fundamentally unfair in *Doyle* because:

> *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that silence will not be used against him . . . *Doyle* bars the use of silence maintained after the receipt of government assurances.

Fletcher v. *Weir*, 455 U.S. 603, 606 (1982) also confirmed the unfairness of using silence to impeach a defendant when that silence was induced by government action. Accordingly, in *Greenfield* v. *Wainwright*, 88 L.Ed.2d 623, 630 (1986), this Court recently concluded that:

> *Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that Due Process requires.

The State's suggestion that *Doyle* violations are insignificant infractions undeserving of constitutional status is further refuted by *Doyle's* recognition that silence in the wake of *Miranda* warnings may be nothing more than an exercise of an arrestee's constitutional rights. *Doyle* v. *Ohio*, 426 U.S. at 617. Consequently, for the government to subsequently impeach the defendant with evidence of *Miranda* warnings silence is a due process violation "of the most basic sort." *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). As this Court has stated:

> [F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."
>
> *Bordenkircher* v. *Hayes*, 434 U.S. at 363 quoting *Chaffin* v. *Stynchome*, 412 U.S. 17, 32-33 (1977).

Indeed, prosecutorial comment upon a defendant's *Miranda* warings silence is no less egregious than comment upon a defendant's failure to take the stand and testify in his own behalf. In *Griffin* v. *California*, 380 U.S. 609, 614 (1965), the Court held that the Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts that right. While it is clear that a defendant who takes the stand waives his Fifth Amendment privilege (*Raffel* v. *United States*, 271 U.S. 494 (1926)), it is equally clear that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his [Fifth Amendment] privilege." *Moran* v. *Burbine*, 89 L.Ed.2d 410, 441 (1986). Thus, where a defendant takes the stand after the State has promised not to use his *Miranda* warnings silence against him, the State's subsequent breach of that promise renders the defendant's waiver of his Fifth Amendment privilege involuntary.

The State further asserts that notwithstanding the fundamental unfairness inherent in prosecutorial comment upon *Miranda* warnings silence, such comment should be allowed because it is probative of the defendant's credibility.[8] However, *Doyle* recognized that

[8] Although the State of Illinois claims that post-arrest silence is probative, the Illinois Supreme Court has long recognized that "evidence of defendant's post-arrest silence is inadmissible because such evidence is neither material nor relevant having no tendency to prove or disprove the charge against a defendant." *People* v. *McMullin*, 138 Ill.App.3d 872, 486 N.E.2d 412, 415 (2d Dist. 1985), citing *People* v. *Lewerenz*, 24 Ill.2d 295, 299, 181 N.E.2d 99 (1962); *People* v. *Rothe*, 358 Ill. 52, 57, 192 N.E. 77 (1934).

Miranda warnings silence is "insolubly ambiguous" because silence in the wake of these warnings may be nothing more than the arrestee's exercise of the *Miranda* rights. Indeed, as this Court recently emphasized, "*Miranda* warnings may inhibit persons from giving information." *Oregon* v. *Elstad*, 84 L.E.2d 222, 232 (1985). Moreover, although the State asserts that "subsequent cases abandon this strand of *Doyle's* rationale" (Brief of Petitioner at 24), this Court recently emphasized that just what induces *Miranda* silence "remains as much a mystery today" as it did at the time of *Doyle*. *Wainwright* v. *Greenfield*, 88 L.Ed.2d at 632 n. 11. "Silence in the face of an accusation is an enigma and . . . is not determinative of one's guilt." *Wainwright* v. *Greenfield*, 88 L.Ed.2d at 632 n. 11.

Finally, the State asserts that Miller's trial was fundamentally fair because the prosecutor's unconstitutional attack on Miller's credibility did not undermine the process of adjudication. This argument simply does not comport with the prosecutor's acknowledgement that the resolution of Miller's guilt was dependent upon the jury's assessment of Miller's credibility. As the prosecutor stated during closing argument:

> You either believe Randy Williams or you believe "Chuck" Miller. That is your choice. It's as simple as that.
>
> (Vol. VII, R. 73)

Under these circumstances, the *Doyle* violation had a direct effect on the outcome of the trial. As the Court of Appeals concluded:

> Because the crucial issue at trial was credibility, the *Doyle* violation went to the heart of the truth-seeking process.
>
> (A 16)

Significantly, the State has not even attempted to meet the *Chapman* requirement of proving beyond a reasonable doubt that the unconstitutional comment "did not contribute to the verdict obtained."[9] 383 U.S. at 24. It is a contradiction in terms to argue that while the error may have contributed to the conviction, it had "nothing to do with the process of adjudicating guilt or innocence." (Brief of Petitioner at 28.)

C. The Abandonment Of The *Chapman* v. *California* Harmless Error Standard Would Frustrate Deterrence And Compound The Underlying Constitutional Violation.

In *Chapman*, the Court recognized that "harmless error rules can work very unfair and mischievous results" unless they are narrowly circumscribed. 383 U.S. at 24. Accordingly the Court placed the burden on the beneficiary of the error to prove that it was harmless beyond a reasonable doubt. Complaining that the *Chapman* standard is too "stringent" (Brief of Petitioner at 13), the State proposes that the prosecutor should be allowed to inject *Doyle* error into the trial, and then shift the burden to the defendant to affirmatively prove outcome determinative prejudice. However, the abandonment of the *Chapman* standard, in addition to creating an unacceptable risk of affirming a judgment which was influenced by constitutional error, would frustrate deterrence and compound the underlying constitutional violation.

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[9] The State acknowledges that "[o]verwhelming evidence of guilt . . . is the minimum requirement to prove harmlessness." (Brief of Petitioner at 31.) However, the State has not suggested that the evidence against Miller was overwhelming. Indeed, the State concedes that there was "little in the way of corroboration for Randy Williams' testimony" that Miller was involved in the crime. (Brief of Petitioner at 37)

Prosecutorial comment on *Miranda* warnings silence is a recurrent problem. Notwithstanding the constitutional prohibition against the use of such inadmissible evidence, courts have expressed concern and alarm over the increasing tendency of prosecutors to deliberately violate a defendant's constitutional rights. *See United States* v. *Wycoff*, 545 F.2d 679, 682 (6th Cir. 1976); *State* v. *Williams*, 64 Ohio.App.2d 271, 413 N.E.2d 1212, 1216, n.3 (1979). If the harmless error standard is diluted, it would only further encourage prosecutors to flaunt the *Doyle* ruling.

In fact, it appears that this is exactly what happened in this case. At trial, the prosecutor took a calculated risk by commenting upon respondent's *Miranda* silence in an attempt to shore up the State's less than overwhelming case. On appeal, the State has not only attempted to seek sanctuary in the doctrine of harmless error, but has argued that the burden should be on respondent to prove that he probably would have been acquitted absent the prosecutor's misconduct. Thus, it is clear that the prosecutor must be held accountable for his misconduct by being required to prove that the constitutional violation was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. at 24.

Furthermore, it would be inconsistent with the guarantee of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment to require the victim of a constitutional error to establish outcome determinative prejudice. As the Court emphasized in *Chapman:*

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.

386 U.S. at 24.

For these reasons, it is clear that the *Chapman* harmless error standard must be applied to violations of *Doyle* v. *Ohio*.

III. SINCE THE HARMLESS ERROR RULE OF *CHAPMAN* v. *CALIFORNIA* AND THE WRIT OF HABEAS CORPUS SHARE A CENTRAL CONCERN FOR FUNDAMENTAL FAIRNESS, THERE IS NO REASON TO ABANDON THE *CHAPMAN* STANDARD ON HABEAS REVIEW.

In *Chapman* v. *California*, 386 U.S. 18, 21 (1967), the Court held that when constitutional rights are violated the question of harmlessness is a federal question governed by federal law:

> Whether a conviction for a crime should stand when a state has failed to accord federally constitutionally guaranteed rights is every bit as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.
>
> 386 U.S. at 21.

Accordingly, the Court concluded that "before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 25. Since *Chapman*, this Court has applied the harmless beyond a reasonable doubt standard to direct and collateral review alike. *See Rose* v. *Clark*, 92 L.E.2d 460, 469 (1986) (citing cases) Nevertheless, while acknowledging that the states are required to apply the federal harmless error standard on direct review, the State argues that a less stringent standard should be applied on federal habeas review.

The State's argument overlooks the fundamental principle underlying our federal system:

> Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution."
>
> *Rose* v. *Lundy*, 455 U.S. 509, 517 (1982) quoting *Ex parte Royall*, 117 U.S. 241, at 251 (1886).

In 28 U.S.C. § 2254, Congress has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. Thus, "[i]f the States withhold effective remedy, the federal courts have the power and duty to provide it." *Fay* v. *Noia*, 372 U.S. 391, 441 (1963).

The *Chapman* standard provides an effective remedy while also balancing competing interests. Although the State asserts that the *Chapman* standard does not take into account the problems associated with collateral review, it is clear that the *Chapman* standard and the writ of habeas corpus share a central concern for fundamental fairness. Recently, in the context of habeas corpus review, this Court reaffirmed the "strong interests" that support the *Chapman* rule:

> The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.
>
> *Rose* v. *Clark*, 92 L.Ed.2d 460, 470 (1986).

Chapman's focus on the underlying fairness of the trial comports with the principal concerns of habeas corpus. As the State notes:

> The principle concern for the writ of habeas corpus is the fundamental fairness of the judgment by which the State seeks to maintain an individual in custody.

> Brief of Petitioner at 41.

Despite this common concern for fundamaental fairness, the State concludes that the *Chapman* standard should be abandoned on habeas review. The State reasons that concerns for comity and finality require that the burden be shifted to the victim of the constitutional error to affirmatively prove outcome determinative prejudice. In examining the State's argument, respondent will demonstrate that (A) the minimal costs associated with collateral review do not outweigh respondent's interest in obtaining a fair trial; (B) the application of the outcome determinative test to harmless error analysis would be fundamentally unfair and judicially unsound; and (C) the application of the outcome determinative standard would undermine the intent of Congress.

A. The Minimal Costs Associated With Collateral Review Do Not Outweigh The Respondent's Interest In Obtaining A Fair Trial.

The State argues that *Chapman's* "policy of strict enforcement of constitutional rights on collateral review" is outweighed by the competing interests of comity and finality. (Brief of Petitioner at 29, 33) However, the State's argument proceeds from a faulty premise because by rejecting a *per se* rule of automatic reversal, the *Chapman* Court specifically declined to adopt a "policy of strict enforcement." Instead, the Court recognized that in the context of a particular case, certain constitutional errors may have been "harmless" in terms of their effect on the fact finding process. The Court concluded that the beneficiary of the constitutional error would be allowed to avoid "reversal of his erroneously obtained judgment" if he could show that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. Thus, rather than competing with state interests, the *Chapman* rule actually

saves the time, effort and expense of unnecessary retrials where the defendant has not been prejudiced by the error.

Moreover, contrary to the State's assertions, "few defendants prevail in federal habeas corpus proceedings . . ." *Phelps* v. *Duckworth*, 772 F.2d 1410, 1419 (7th Cir. 1985) (concurring opinion) "It is the occasional abuse that the writ of habeas corpus stands ready to correct." *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979). And in those few cases where habeas relief is granted, the remedy under *Chapman* is not a "windfall" for the defendant as the State suggests. (Brief of Petitioner at 31) "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for the State may . . . try him again by the procedure which conforms to constitutional requirements." *Rose* v. *Mitchell*, 443 U.S. 545, 558 (1979) quoting *Hill* v. *Texas*, 316 U.S. 400, 406 (1942).

For these reasons, it is clear that the State has overstated the costs associated with the *Chapman* standard of harmless error review. Relying on these exaggerated costs, the State concludes that the interests of comity and finality preclude application of the *Chapman* standard on collateral review. However, as the Court has recognized.

> [T]he problems of finality and federal-state comity arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation.
>
> *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979).

Thus, unless the State is suggesting that the outcome determinative test would preclude habeas relief altogether, these problems would not be solved by abandoning the *Chapman* standard. As the Court of Appeals stated:

> Unless we are to conduct our own cost/benefit analysis and declare habeas relief a thing of the past, this [harmless beyond a reasonable doubt] inquiry remains our responsibility.
>
> (A 12)

In support of its argument, the State relies on cases that have balanced competing interests with respect to claims that were procedurally defaulted in state court. See e.g., *Murray* v. *Carrier*, 91 L.Ed.2d 397 (1986); *Wainwright* v. *Sykes*, 433 U.S. 71 (1977); *Engle* v. *Issac*, 456 U.S. 107 (1982). These cases recognize that the State's interest in the finality of its judgments would be undermined if the federal courts were too free to ignore procedural forfeitures in state court. *Murray* v. *Carrier*, 91 L.ED.2d at 429. Thus, these decisions are consistent with the doctrine of comity which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter." *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) quoting *Darr* v. *Buford*, 339 U.S. 200, 204 (1950). However, this concern is not present here where respondent preserved his constitutional claim in state court and exhausted state remedies prior to seeking haeas review.

The State also relies heavily on the rationale of *Stone* v. *Powell*, 428 U.S. 465 (1976). In *Stone*, the Court barred habeas review of Fourth Amendment challenges by prisoners who had been afforded an opportunity for full and fair litigation of their search and seizure claims in state court. However, the Court expressly stated that its decision "[was] *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutinal claims generally." 428 U.S. at 495, n. 37 (emphasis in original). Rather, the Court simply "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right" and emphasized "the

minimal utility of the [exclusionary] rule" in the context of federal collateral procedings. 428 U.S. at 495, n. 37. Subsequent cases have restricted the *Stone* rationale to Fourth Amendment exclusionary rule claims and have repeatedly refused to extend its limitations on federal habeas review to any other context. *Kimmelman* v. *Morrison*, 91 L.Ed.2d 305 (1986) (declining to extend *Stone* to ineffective assistance of counsel claims alleging counsel's failure to litigate adequately a Fourth Amendment claim); *Rose* v. *Mitchell*, 443 U.S. 545 (1979) (declining to extend *Stone* to claims of racial discrimination in selection of grand jury foremen); *Jackson* v. *Virginia*, 443 U.S. 307 (1979) (declining to extend *Stone* to claims by state prisoners that the evidence in support of their convictions was not sufficient to permit a rationale trier of fact to find guilt beyond a reasonable doubt, as required by *In re Winship*, 397 U.s. 358 (1970)).

Moreover, in contrast to the habeas petitioner in *Stone*, who sought merely to avail himself of the exclusionary rule, respondent Miller seeks direct federal habeas protection of his right to a fair trial. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope* v. *Missouri*, 420 U.S. 162 (1975). "[T]his court has left no doubt that the probability of the deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

For these reasons, it is clear that the problems of comity and finality simply do not outweigh the respondent's interest in obtaining a fair trial and "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Reed* v. *Ross*, 468 U.S. 1, 10 (1984). While retrial sometimes will occur in cases such as this where the prosecutor has injected constitutional error into the trial, the additional costs of the

new trial are directly attributable to the prosecutor's misconduct and not to the writ itself:

> Official overzealousness of the type which violates the petitioner's conviction below has only deleterious effects. Here it has put the state to the substantial additional expense of prosecuting the case through the appellate courts and, now, will require even a greater expenditure in the event of a retrial, as is likely.
>
> But it is the deprivation of the protected rights themselves which is fundamental and the most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice.
>
> *Haynes* v. *Washington*, 373 U.S. 503, 519 (1963).

B. It Would Be Fundamentally Unfair And Judicially Unsound To Require The Victim Of Federal Constitutional Error To Establish Outcome Determinative Prejudice.

The State argues that while the *Chapman* standard applies on direct review, a different standard should be applied on collateral review. Relying on *Strickland* v. *Washington*, 466 U.S. 668 (1984), the State asserts that victims of constitutional errors must establish outcome determinative prejudice prior to obtaining habeas corpus relief. However, not only is the State's reliance on *Strickland* misplaced, the application of the outcome determinative standard would be fundamentally unfair and judicially unsound.

In *Strickland*, the Court held that when a defendant alleges ineffective assistance of counsel, he must demonstrate outcome determinative prejudice in order to establish a constitutional violation. The Court reasoned that because attorney errors are difficult to define and impossible for the government to prevent, the burden should be

on the defendant to establish prejudice. The Court concluded that the same standard should be applied on direct and collateral review alike. 466 U.S. at 697-698.

Thus, *Strickland* simply does not support the State's argument that different standards should apply on direct and collateral review. Moreover, *Strickland* concerned the threshold requirements for establishing an error of constitutional dimension, rather than the remedy to be applied to the constitutional violation itself. Finally, the outcome determinative standard announced in *Strickland* was premised on the rationale that the government should not be held accountable for defense counsel's errors. This rationale is obviously inapplicable in the present case where the prosecutor injected the constitutional error into the trial.

Under the circumstances of this case, where the State was both the source and the beneficiary of the error, it would be fundamentally unfair to require the victim of the constitutional error to establish outcome determinative prejudice in federal court. As the Court emphasized in *Chapman*:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.
>
> 386 U.S. at 24.

Unlike the *Chapman* standard, the outcome determinative test simply creates too great a risk of affirming a judgment that was influenced by error.

Furthermore, the outcome determinative standard, as applied to harmless error review, usurps the function of the jury by requiring the reviewing court to determine whether the defendant probably would have been acquitted had not the prosecutor injected constitutional error into the trial. As the Court has recognized, "the federal courts do not sit to re-try state cases de novo, rather, to review for violation of federal constitutional standards." *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972). Unlike *Strickland*, in this case it has already been established that the Constitution was violated. Under these circumstances, "it is not the appellate court's function to determine guilt or innocence." *Kotteakas* v. *United States*, 328 U.S. 750, 764 (1946).

The protection of constitutional rights, as well as the development of a coherent doctrine of harmless error, also militate against the application of the outcome determinative test. *In re Winship*, 397 U.S. 358 (1970) held that an accused cannot be convicted unless the trier of fact is convinced beyond a reasonable doubt that the accused is guilty as charged. It has been observed that in order to maintain the integrity of the *Winship* standard, reviewing courts must utilize a comparable standard when determining whether an error was harmless:

> It would make little sense to adopt the *Winship* standard, which is designed to prevent criminal convictions if there is even a reasonable doubt in the minds of jurors as to the guilt of the person charged, and then on appeal to emasculate that evidentiary standard when the trial court has violated evidentiary rules which might have influenced the jury by creating the reasonable doubt. . .
>
> Saltzburg, *The Harm of Harmless Error*, 59 Va.L.Rev. 988, 992 (1973).

While the *Chapman* rule is commensurate with *Winship*, the outcome determinative test would emasculate the standard of proof at trial by allowing the State to obtain a conviction premised on constitutional error, thereby

shifting the burden of proof to the defendant to demonstrate outcome determinative prejudice in federal court.

In addition to undermining the *Winship* standard of proof, the outcome determinative test is simply inadequate to safeguard the underlying constitutional rights. The adoption of the test proposed by the State would effectively insulate the state court's application of the federal harmless error standard from federal review, except in those isolated cases where the defendant can show the outcome would have been different. As Justice Marshall has noted:

> A limited ability to exercise our certiorari jurisdiction prevents us from effectively policing the nullification of constitutional requirements through the abuse of the harmless error doctrine; nor is it our role to correct such factual errors.
>
> *Briggs* v. *Connecticut*, 447 U.S. 912 (1980) (dissenting from denial of certiorari).

Thus, under the outcome determinative approach, state reviewing courts could avoid the requirements of the Constitution merely by reciting that the error was harmless beyond a reasonable doubt. Since the *Chapman* finding would not be subject to federal review except in rare and extraordinary circumstances, the state appellate judge would not be deterred from focusing his inquiry on the correctness of the result and then holding the error harmless whenever he equated the result with his own predilections.

Consequently, the outcome determinative standard of harmless error review conflicts with the policies underlying the habeas corpus statute. As the Court has stated:

> The provision of federal collateral remedies rests . . . fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.
>
> *Kaufman* v. *United States*, 394 U.S. 217, 226 (1968).

"[T]he threat of habeas serves as the necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Stone* v. *Powell*, 428 U.S. at 520 (Brennan, J. dissenting) quoting *Desist* v. *United States*, 394 U.S. 244, 262-263 (1969) (dissenting opinion). The availability of collateral review assures "that the lower federal and state courts toe the constitutional line." Id. at 521. Therefore, "[i]n effect, habeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard that rights secured under the Constitution and federal laws are not merely honored in the breach." Id. at 521.

For these reasons, it would be fundamentally unfair and judicially unsound to replace the *Chapman* standard with a requirement that the defendant show outcome determinative prejudice on habeas review.

C. The Application Of The *Chapman* Harmless Error Standard On Federal Collateral Review Of State Convictions Comports With The Intent Of Congress As Embodied In 28 U.S.C. § 2254, And Any Modification Of The Harmless Error Standard Is Properly A Legislative Function.

In *Chapman*, the Court held that the final decision of whether a constitutional error is harmless is one of federal law. 386 U.S. at 20-21. Nevertheless, the State argues that the federal harmless error rule should be abandoned on federal habeas corpus review of state convictions. The State's argument ignores the fact that Congress "has selected the federal district courts as precisely the forums that are responsible for determining whether state con-

victions have been secured in accord with federal constitutional law." *Jackson* v. *Virginia*, 443 U.S. at 323.

Under § 2254 of the habeas corpus statute (28 U.S.C. 2241 et. seq.), a federal court must entertain a claim by a state prisoner that he or she is being held in "custody in violation of the Constitution or laws or treaties of the United States." The statute codifies "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Reed* v. *Ross*, 468 U.S. 1, 10 (1984). In enacting § 2254, "Congress sought to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional actions." *Reed* v. *Ross*, 468 U.S. at 10, quoting *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972).

The State nonetheless argues that due to additional considerations of comity and finality which are present on collateral review, the victim of the constitutional error should be required to show that but for the error, he probably would not have been convicted. However, Congress has been aware of the competing interests cited by the State, but has declined to alter the statute. Specifically, Congress has rejected proposals that would have required a habeas petitioner to establish that but for the constitutional violation, he would probably have been acquitted. *See* Yackle, *Post-Conviction Remedies*, § 101, p. 397 (1981).

This Court is required "to give fair effect to the habeas corpus jurisdiction enacted by Congress." *Brown* v. *Allen*, 344 U.S. 443, 500 (1953) (opinion of Frankfurter, J.) Since Congress has rejected the limitation on habeas review proposed by State, its adoption by this Court would undermine the intent of Congress.

For these reasons, the *Chapman* standard should not be abandoned on habeas review.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, and the cause remanded with directions to order respondent Miller's release from custody unless the State of Illinois retries him within the 120-day time limit. Ill.Rev.Stat., 1985, Ch. 38, § 103-5.

Respectfully submitted,

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